

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA-09-0487

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**VALERIE EMMERSON,**

Appellant,

v.

**WALLACE C. WALKER and RANA RAE WALKER,**

Appellees,

v.

**S. TUCKER JOHNSON,**

Appellee.

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**APPELLANT'S BRIEF**

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On Appeal From The District Court Of The  
Sixth Judicial District Court Of The State Of Montana  
In And For The County Of Sweet Grass

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## **I. STATEMENT OF THE ISSUE PRESENTED FOR REVIEW**

1. Did the district court abuse its discretion when calculating Walkers' attorneys' fees award?

## **II. STATEMENT OF THE CASE**

This action arose out of a written agreement ("Agreement") between appellees Walkers ("Walkers") and appellant Emmerson ("Emmerson"). The Agreement called for the exchange of two pieces of real property. Emmerson believed the Agreement was not binding and filed a declaratory judgment seeking the Sixth Judicial District Court's ("District Court") ruling as to the validity of the Agreement. Walkers answered and subsequently filed claims against appellee S. Tucker Johnson ("Johnson"). The Walkers' claims against Johnson included tortious interference with contract, intentional infliction of emotional distress, and negligent infliction of emotional distress.

Subsequent to a judge trial, the District Court entered its Findings of Fact and Conclusions of Law. The District Court found in favor of Walkers and against Emmerson and Johnson. There being an attorney's fees provision in the Agreement, the District Court's findings and conclusions awarded Walkers' attorneys' fees. Emmerson contends that the District Court abused its discretion regarding the amount of attorney's fees awarded.

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### **III. STATEMENT OF FACTS**

In January, 2000, Walkers purchased a piece of real property legally described as follows:

A tract of land located in the West ½ and East ½ of Section 23, and the North ¼ of the Northwest ¼ and the North ½ of the Northeast ¼ of Section 26, Township 2 North, Range 16 East, Principal Montana Meridian, Sweet Grass County, Montana (“East Fork Property”).

The East Fork property was located far from the Walkers’ residence and Dr. Walker’s medical practice in Big Timber. Because the East Fork Property was inconveniently located for the Walkers, they began a search for another piece of property that would better satisfy their needs. In April of 2005, the Walkers found a tract of land fitting their needs. The land was owned by Emmerson. The Walkers contacted Emmerson and inquired whether she was interested in selling her property. At the time, Emmerson was not interested. Emmerson’s parcel is particularly described as follows:

Lots 3 and 4 and the East ½ Southwest ¼ and the East ½ of Section 18, Township 2 North, Range 14 East, Principal Montana Meridian, Sweet Grass County, Montana (“Emmerson Property”).

In January, 2006, the Walkers and Emmerson resumed talks about a sale or exchange of their respective properties. The parties decided that a 1031 Exchange would be the most convenient for all involved. In May, 2006, the Walkers and Emmerson reduced their agreement to writing. The parties agreed to exchange the lands under Section 1031 of the Internal Revenue Code of 1986.

Sometime later, Emmerson came to believe that the Agreement may not be binding for a lack of consideration and a failure of conditions precedent. Emmerson filed a declaratory judgment action in order to seek the District Court's ruling as to the validity of the Agreement. Walkers answered the petition and subsequently filed third-party causes of action against Johnson. The Walkers claims against Johnson included tortious interference with contract, intentional infliction of emotional distress, and negligent infliction of emotional distress. Johnson answered and asserted several counterclaims against Walkers.

After a bench trial, the District Court ruled in favor of Walkers. The District Court's Judgment ordered Emmerson to go through with the land exchange and pay Walkers' attorneys' fees. Walkers also prevailed against Johnson.

Upon the District Court's request, Walkers' attorneys, Leanne Schraudner ("Schraudner") and Mark Josephson ("Josephson"), submitted a calculation of their fees. Schraudner filed several affidavits of costs and attorneys fees. Schraudner's affidavit reflected costs in the amount of \$2,401.50, while her affidavit of attorney's fees showed fees in the amount of \$34,826.25. Walkers' other attorney, Josephson, also filed an affidavit of costs and attorneys fees. Josephson's costs amounted to \$120.00. Josephson's attorney's fees amounted to \$757.50. Emmerson and her attorney, Karl Knuchel ("Knuchel"), objected to the affidavits and their attendant calculations because a substantial portion of the fees

appeared to arise out of the third-party claims asserted by Walkers and the defense of counterclaims raised by Johnson. *See Emmerson's Notice of Objection to Walkers' Calculation of Attorney's Fees and Costs.*

The District Court scheduled an attorney's fees hearing. Schraudner called Susan Swimley to testify as to the validity of Schraudner's fees. Swimley testified that the fees were reasonable in terms of the hourly rate and the total fee charged. *Transcript of Attorney's Fees Hearing.* Swimley also testified that Schrauder had good standing within the legal community. *Id.*

Kevin Brown ("Brown"), an experienced trial attorney, testified on behalf of Emmerson. Brown noted that Knuchel and Schraudner were both charging \$175 per hour for the majority of the case. *Id.* Based upon the hourly rate charged by each attorney, Brown testified that, in his estimation, the discrepancy between the fees charged by Knuchel (approximately \$18,400.00) and Schraudner (approximately \$34,826.25) was due to Schrauder's pursuit of third-party claims against Johnson and the defense of Johnson's counterclaims. *Transcript of Attorney's Fees Proceeding*, p. 17. Brown added that the third-party claims interjected a whole new set of factors into the case, which escalated the case into much more than an "enforcement action". *Id.* Brown further commented:

[W]hen you look at the invoices, I'm seeing a lot of summary judgments and a lot of work that was done incident to this Tucker Johnson, which was tortious interference with the contract, not the

contract itself, enforcing it itself.

So, I mean, I think this is – if you didn’t have the Tucker Johnson situation...I think the case would have been done for a lot less than it was, as far as the amount of time.”

*Id.* at 18.

The Court entered its judgment on attorneys’ fees on July 13, 2009. Despite Brown’s testimony to the contrary, the District Court’s judgment provided an award - \$35,505.95 - which amounted to nearly the entirety of Walkers’ attorneys’ fees. The District Court found that “for the most part, [Schraudner’s and Josephson’s work] could not be segregated because the claims [arose] from the same facts, involved the same witnesses and the joint efforts of Emmerson and Johnson.” *Findings of Fact, Conclusions of Law re: Attorney's Fees & Costs*, p. 3.

#### **IV. STANDARD OF REVIEW**

The Supreme Court will review a district court’s order granting or refusing attorney’s fees for an abuse of discretion. *Eisenhart v. Puffer*, 2008 MT 58, ¶ 33, 341 Mont. 508, 178 P.3d 139. An abuse of discretion is said to occur “when [a district court] acts arbitrarily without employment of conscientious judgment or exceeds the bounds of reason, resulting in substantial injustice.” *State v. Ferguson*, 2005 MT 343, ¶22, 330 Mont. 103, 126 P.3d 463.

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## **V. SUMMARY OF THE ARGUMENT**

The District Court clearly abused its discretion when it ordered Emmerson responsible for the vast majority of Walkers' attorneys' fees. The law in Montana clearly provides that a prevailing party can only recover fees on those theories under which the fees are allowable. In this case, the only allowable fees are those associated with the declaratory judgment action. As will be shown herein, Montana law substantiates Emmerson's arguments and conclusively proves there is absolutely no justification for the District Court's unconscionable attorneys' fees award.

As this case now stands, Emmerson is responsible for nearly the entirety of Walkers' attorneys' fees even though at least half of the fees are directly attributable to third-party claims forwarded by, and defended by, Walkers. Emmerson is asking this Honorable Court to remand this cause. Remand would allow the District Court to conduct a more accurate, reasonable, and conscientious calculation of the amount of the attorneys' fees to be awarded.

## **VI. ARGUMENT**

### **1. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT ORDERED EMMERSON TO PAY ATTORNEYS' FEES AMOUNTING TO \$35,505.95.**

The Montana statutes provide that "[t]he measure and mode of compensation of attorneys and counselors at law is left to agreement, express or

implied, of the parties[.]” Mont. Code Ann. § 25-10-301 (2009). The Montana Supreme has further clarified, holding that the State follows the American Rule and will only award attorney’s fees in a civil action if there is a specific contractual or statutory provision providing for such an award. *Hernandez v. Board of County Commissioners*, 2008 MT 251, ¶29, 345 Mont. 1, 189 P.3d 638. When making a calculation regarding such an award, the court shall consider circumstances such as “the amount and character of the services rendered, the labor, time and trouble involved, the character and importance of the litigation in which the services were rendered, the amount of money or the value of property to be affected, the professional skill and experience called for, the character and standing in their profession of the attorneys.” *First Security Bank of Bozeman v. Tholkes* (1976), 169 Mont. 422, 429-430, 547 P.2d 1328, 1332. In addition to the above, a court may consider “[t]he result secured by the services of the attorney[.]” *Id.* The amount of fees to which a party is entitled is within the discretion of the district court. *Glick v. State, Montana Department of Institutions* (1974), 165 Mont. 307, 528 P.2d 686.

But, in some cases, the amount of fees to be awarded involves additional considerations. For example, in a case involving multiple claims or multiple theories, an award of attorney fees must be based on the time spent by the prevailing party’s attorney on the claim or theory under which attorney fees are

*allowable. Northwestern Nat. Bank v. Weaver-Maxwell* (1986), 224 Mont. 33, 44, 729 P.2d 1258, 1264-65 (emphasis added).

The case *sub judice* falls within the purview of each and every case cited above. As a result, the District Court should have considered all those factors outlined therein. The District Court failed in that regard, and Emmerson takes issue with what appears to be the District Court's complete disinterest in applying the tenets of *Northwestern Nat. Bank v. Weaver-Maxwell*. In accordance with *Northwestern*, Emmerson insists that she is not accountable for any fees associated with Walkers' assertion and defense of the third-party claims.

In *Kadillak v. Montana Department of State Lands* (1982), 198 Mont. 70, 643 P.2d 1178, Chief Justice Haswell upheld an award of attorney's fees in a factually similar case. *Kadillak* was a highly complex and involved case made up of fourteen counts, one of which was a mandamus action. *Id.* At the conclusion of the case, the *Kadillak* plaintiffs were successful on the mandamus issue and were awarded attorney's fees in accordance with the Montana mandamus statute. *Id.* At an attorney's fees hearing, the plaintiffs' attorney requested fees for 90% of the total hours spent on the case. *Id.* The defendants countered with an expert witness who estimated that only a portion of the hours billed could be actually attributed to the mandamus action. *Id.* The expert witness testified that "[b]ecause so many issues had been raised and so much evidence presented,...the only productive way

to fix a reasonable attorney fee award was to *estimate* the number of hours it would have taken to bring to trial and appeal the mandamus issue.” *Id.* (emphasis added).

The district court judge agreed with the defendants’ expert:

[The Judge] stated that it was not possible to isolate or clearly distinguish the elements of the mandamus issue and that the elements of pleading and proof in the case were so intertwined and convoluted that no rational allocation of attorney effort could be made. Therefore [the Judge] based the award of attorney fees on the number of hours [the defendants’ expert] estimated as reasonable for the mandamus issue.

*Id.*

Chief Justice Haswell upheld the district court’s decision. Haswell provided support for an attorney’s fees formula which should be applied to the case at bar when he wrote:

The original trial in this case lasted for thirteen days and involved six defendants and fourteen separate counts ranging from counts in nuisance and trespass to alleged violations of the Montana Environmental Policy Act, the 1972 Montana Constitution, the Hard Rock Mining Act, the Water Pollution Control Act and the Clean Air Act. The case was complex and *involved numerous issues other than the mandamus issue* upon which the plaintiffs ultimately prevailed on appeal. Since the attorney fee award is to be based only on the hours spent by the attorney on the mandamus issue and since the elements of proof in the case were so intertwined, the District Court judge did not abuse his discretion in basing the award on the estimate given by an experienced trial attorney as to the number of hours necessary to prevail on the mandamus issue.

*Id.*

Although the *Kadillak* decision does not appear to create law mandating an

estimation of attorney's fees in similar cases, an argument can be made that the reasoning provided in *Kadillak* can certainly be applied to this action. When one reads the mandamus statute and its attendant costs provision, and compares it with the provision within the Agreement, it is clear that attorney's fees provision issues are very similar. Moreover, consider the parallels in Chief Justice Haswell's above-quoted comments and the District Court's findings and conclusions as to attorneys' fees; both comment on the difficulty in parsing the costs associated with each individual cause of action. (*See above*, where the District Court commented that "for the most part, [Schraudner's and Josephson's work] could not be segregated because the claims [arose] from the same facts, involved the same witnesses and the joint efforts of Emmerson and Johnson.")

It is clearly evident that Emmerson and Walkers are struggling with the same issues as the *Kadillak* parties. Despite the similarities, the District Court seemed reluctant to conduct an accurate calculation. The District Court failed to do so even after Emmerson provided citations to *Northwestern* (*See Emmerson's Notice of Objection to Walkers' Calculation of Attorney's Fees*) and *Kadillak* (*See Petitioner's Proposed Findings of Fact and Conclusions of Law on Attorney's Fees and Costs*). Instead, the District Court decided that an accurate calculation was too burdensome, chose the easy route, and gave the Walkers exactly what they asked for. In so doing, the District Court clearly abused its discretion, acted

arbitrarily, and produced a result which, if upheld, will lead to substantial injustice.

## **VII. CONCLUSION**

The District Court's decision is not in accord with relevant Montana law. Walkers are entitled to only those fees directly related to litigating the original declaratory judgment action. Emmerson should not be liable for those fees associated with any third-party causes of action.

For the foregoing reasons, the Appellant, Valerie Emmerson, respectfully requests this Honorable Court reverse and remand the District Court's attorney's fees decision.

Respectfully submitted this 1 day of December, 2009.

By 

KARL KNUCHEL

Attorney for Appellant Emmerson

### **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11(4)(b) of the Montana Rules of Appellate Procedure, I certify that this brief is printed with 14 point proportionally spaced Times New Roman font; is double-spaced; Microsoft Word 2007, and is not more than 10,000 words, excluding Table of Contents, Table of Authorities, Certificate of Service and Certificate of Compliance.

By



KARL KNUCHEL

### CERTIFICATE OF SERVICE

I hereby certify that I served a full, true and accurate copy of the foregoing document on the 1 day of December, 2009, to the following named person:

\_\_\_\_\_ by personal service

\_\_\_\_\_ by FAX to the following FAX number

X by depositing a copy of same in the United States Mails, postage paid, and addressed as follows:

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A handwritten signature in cursive script, appearing to read "James Goetz", is written over a horizontal line.